IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DIANE NADINE GRIMES, Appellant.	No. 38130-3-II UNPUBLISHED OPINION

Armstrong, J. — Diane Grimes appeals her conviction for third degree assault, arguing that the State failed to present sufficient evidence to disprove self-defense and that her counsel was ineffective in failing to request jury instructions on self-defense. In her statement of additional grounds (SAG), Grimes contends that the prosecutor committed misconduct by arguing facts not shown by the evidence. Finding the evidence sufficient and finding no error, we affirm.[1]

FACTS

On February 25, 2007, Darlene Guyette received a call from her sister, Grimes, who was crying and upset and said that she wanted to die. Guyette took Grimes to the hospital after she reported chest and shoulder pain and that she had taken pills and alcohol. At the hospital, a nurse took Grimes into a triage room to take her vital signs. When the nurse quizzed Grimes on why she would mix pills and alcohol, Grimes became upset and attempted to leave. The nurse attempted to grab Grimes several times to prevent her from leaving. Eventually, Guyette calmed Grimes down and got her back into the triage room.

[1] A commissioner of this court initially considered Grimes' appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

During this altercation, the triage nurse called a "code white," signaling a threat to staff. Report of Proceedings (RP) (May 12, 2008) at 16. Staff members responded and observed Grimes fighting with and screaming at the triage nurse. Security arrived and attempted to restrain Grimes, but she continued to fight. Nicholas Bozarth, an emergency room technician, responded to the code and attempted to talk Grimes into calming down. Grimes calmed down for a few moments, but then became agitated again and resumed her attempts to hit and kick staff. When Bozarth moved in to help hold down Grimes's left leg, her right leg came up and kicked him in the left side of the face. After the kick, hospital staff restrained Grimes by tying her down.

Bozarth suffered "immediate swelling, redness, tenderness to the area around [his] eye and left cheek." RP (May 12, 2008) at 18. Bozarth's face continued to swell during the night and remained tender for a couple days.

The State charged Grimes with third degree assault. Grimes testified that she did not remember going to the hospital or any events from February 25, 2007. She stated that at the time, she was receiving treatment for manic depression, anxiety, and bipolar disorder. The jury found her guilty as charged and she appeals.

ANALYSIS

First, Grimes argues that there was insufficient evidence to prove that she committed assault because the State did not prove that she did not act in self-defense. "In determining whether the requisite quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case." *State v. Jones*, 93 Wn. App. 166, 176, 968 P.2d 888 (1998). Substantial evidence

is "evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (citation omitted). Evidence is sufficient to support a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

A person is guilty of third degree assault if she "[a]ssaults a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault." RCW 9A.36.031(1)(i). To raise a claim of self-defense, the defendant must first offer credible evidence tending to prove self-defense. *State v. Graves*, 97 Wn. App. 55, 61, 982 P.2d 627 (1999) (citation omitted). A person acts in self-defense when she reasonably believes that she is about to be injured and when the force used is not more than is necessary. RCW 9A.16.020(3). A defendant must produce evidence showing that she had a good faith belief in the need to use force, which belief was objectively reasonable. *State v. Miller*, 89 Wn. App. 364, 367-68, 949 P.2d 821 (1997).

Contrary to Grimes's argument, the State's burden to disprove self-defense never arose. The burden shifts to the State to disprove self-defense only after the defendant places the claim at issue. *State v. Acosta*, 101 Wn.2d 612, 615-19, 683 P.2d 1069 (1984). Grimes never asserted self-defense. At her omnibus hearing, Grimes stated that she would raise the defense of intoxication. During trial, she argued that Bozarth consented to the acts and that Grimes was not in her right mind when she acted. She did not assert self-defense, therefore the State's burden never arose.[2]

[2] Grimes also contends, without citation to authority, that (1) the triage nurse used unreasonable

Second, Grimes asserts that her counsel ineffectively represented her by failing to request jury instructions on self-defense. To demonstrate ineffective assistance of counsel, a defendant must show (1) that her trial counsel's performance was deficient and (2) that this deficiency prejudiced her. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Deficient performance is that which falls below an objective standard of reasonableness. *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). Prejudice occurs when trial counsel's performance was so inadequate there is a reasonable probability that the trial result would have been different but for counsel's poor performance, thereby undermining our confidence in the outcome. *Strickland*, 466 U.S. at 694; *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If a defendant fails to establish one element, we need not address the other because the claim fails without proof of both elements. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

Grimes contends there was no strategic reason not to request self-defense instructions, particularly when her counsel basically argued self-defense during closing arguments. She argues that because a defendant can argue in the alternative, there was no reason to not request the jury instructions.

Defense counsel's performance is not deficient when he or she does not request jury instructions unsupported by the evidence. *See State v. Stanley*, 123 Wn.2d 794, 803, 872 P.2d

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force by grabbing her despite requests by Grimes and her sister to let her go, (2) the triage nurse was the first aggressor, and (3) Bozarth attempted to restrain her without her consent. A party who fails to provide adequate authority or citation to authority waives an argument. *See* RAP 10.3(a)(6). Grimes did not provide any authority supporting her claims and has therefore waived these arguments.

502 (1994) (defendant is entitled to jury instructions if they are supported by the evidence); *State v. King*, 24 Wn. App. 495, 501, 601 P.2d 982 (1979) (counsel not required to argue self-defense where the defense is not warranted by the facts). The evidence did not show that Grimes acted in self-defense. A reasonable person would not objectively believe Bozarth was about to injure Grimes. When Grimes kicked Bozarth, he was performing his medical duties. A reasonable person would not believe that a medical technician, who was attempting to restrain a patient who was trying to hit and kick other medical personnel, was attempting to injure the patient. Grimes's trial counsel was not obliged to request jury instructions on self-defense.

In addition, "[w]hile it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error." *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982). Legitimate trial strategy or tactics cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407 (1986). Grimes's trial counsel raised three defenses: (1) intoxication, (2) that Bozarth consented to the kick, and (3) that Grimes was not in her right mind when she acted. Grimes's counsel did argue theories of defense in the alternative but was not required to raise every conceivable defense. *See State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967) (defense counsel is not, "at the risk of being charged with incompetence, obliged to raise every conceivable point . . . or to argue every point to the court and jury which in retrospect may seem important to the defendant."). Grimes does not demonstrate that she received ineffective assistance of

[3] Grimes does not argue that counsel's deficient performance prejudiced her, so we do not address that element.

counsel.[3]

Finally, in her SAG, Grimes argues that the prosecutor committed misconduct during closing argument by arguing facts not supported by the evidence. A defendant claiming prosecutorial misconduct must establish the impropriety of the prosecutor's comments and their prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Comments are prejudicial only where "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Grimes argues that the prosecutor told the jury a nurse testified that it looked as if Grimes had purposefully kicked the victim, but that no one testified to that. This is incorrect. In rebuttal, the State argued that Guyette's testimony supported an inference that Grimes acted intentionally because Guyette testified that Grimes stated, "Don't let them do this to me," and was kicking to get free. RP (May 12, 2008) at 48. The State then argued that, contrary to Grimes's argument, "This is not a random act, her leg didn't just fly free. She took her right leg and kicked Mr. Bozarth on her left hand side in the face. She deliberately and intentionally did this in an attempt to get away." RP (May 12, 2008) at 48-49. Grimes did not object.

A defendant who fails to object to an improper comment waives any error unless the comment is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice" that a curative instruction could not have neutralized the prejudice. *Brown*, 132 Wn.3d at 561. In closing argument, the State has wide latitude in drawing reasonable inferences from the evidence, including commenting on the credibility of witnesses based on evidence in the record. *State v.*

[3] Grimes does not argue that counsel's deficient performance prejudiced her, so we do not address that element.

Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995).

The prosecutor's comments are not improper because she was arguing a reasonable inference from the evidence. Guyette stated that Grimes resisted the hospital staff's efforts, saying, "[D]on't let them tie me up, don't let them, I want to go home, I don't want to be here," and that "[Grimes's] leg came up and she kicked one of the guys that was [holding her down]." RP (May 12, 2008) at 34-35. Based on this testimony, it was appropriate for the prosecutor to argue that Grimes intentionally kicked Bozarth in an attempt to get away. Grimes failed to demonstrate clear and unmistakable error, that the argument was flagrant and ill-intentioned, or that a curative instruction could not have neutralized any prejudice. Thus, she fails to demonstrate prosecutorial misconduct.

We affirm Grimes's judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Armstrong, J.

We concur:

Penoyar, A.C.J.

Van Deren, C.J.